

# SPLIT DECISION: The Origins of Orange County's Appellate Court



by Robert S. Wolfe

**C**reation stories are problematic. This is particularly true for public institutions, where it cannot be said the presence of a complex design bespeaks the hand of an Intelligent Designer.<sup>1</sup> According to one commentator, “[t]he organization of the California Court of Appeal is byzantine in character.”<sup>2</sup> And, as noted by the Appellate Process Task Force of the California Judicial Council, “[t]here does not appear to be any particular rationale for these differences in structure other than historical accident.”<sup>3</sup>

The occasion of the centennial year of the Court of Appeal, which runs from April 2005 to April 2006, is an appropriate time to examine the origins of Orange County's appellate court.

## A County Scorned.

The 1904 constitutional amendment that established the Court of Appeal divided the state along geographical lines, with appellate districts in the north, south and middle. In 1929, a Fourth Appellate District was carved out to include Orange County and nine others. One of the three justices, Emerson J. Marks, hailed from Santa Ana, where he had been a superior court judge. (Marks remained on the court until he retired in 1948.)

For the next 17 years, no Orange County res-

ident served on the Fourth District. Not until 1966 did Stephen K. Tamura become the second Orange County superior court judge (and the first Asian-American) to be elevated to the Court of Appeal.

That same year saw a split of the Fourth District into two divisions, with five justices placed in San Diego, and the other five in San Bernardino. Every county in the Fourth District was assigned to a specific division, save Orange County. Operating in a manner akin to area code overlay zones, the county's appeals were arbitrarily assigned to either San Diego or San Bernardino, with all writs assigned to the latter. The court's convenience — not the litigants' — was the operating factor.

Not surprisingly, Orange County leaders disliked the shared custody arrangement and the physically remote appellate courts. They intensely lobbied for a court of their own. They were helped out by the numbers. By 1970, Orange County had become the largest of the counties in the Fourth District, and the second largest county in the state. It produced nearly half the district's caseload.

In March 1981, Assembly members Richard Robinson (D-Santa Ana) and Marian Bergeson (R-Newport Beach) introduced bipartisan legislation to create an Orange County division of the Fourth District, to be staffed with four new justices. They had reason for optimism: Governor Jerry Brown's recommended 1982 budget included fif-

teen new appellate justices statewide.

The proposal ran into a buzz saw of opposition. Legislative analyst William Hamm recommended that money be used to better train trial judges to avoid mistakes that cause appeals. He also suggested that automated legal research might reduce the need for more appellate judges.<sup>4</sup>

Chief Justice Rose Bird, acting in her capacity as chairperson of the Judicial Council, supported more justices, but objected to any new divisions out of fear that they would increase the Supreme Court's responsibilities to referee conflicts in the law. And some Republicans, including then State Senator John Doolittle (R-Sacramento), opposed any new justices “because of who the appointees would be.”<sup>5</sup> Republican Assembly member Nolan Frizzelle (R-Huntington Beach) also resisted, but denied any political motivation. He said he had “other reasons.”

To facilitate the deal, Robinson convinced the Legislature that a new Orange County division would be revenue neutral. He suggested using the vacant Old County Courthouse as a site, and promised to raise local or private funds to pay for the court's library.

Robinson never tried for a separate district for Orange County. Apparently, this would only have exacerbated fears about case law proliferation. Still, the Judicial Council remained hostile.

The bill passed by a majority vote. Because

many Republicans declined to join, Robinson could not secure a two-thirds vote for an appropriation. The new law, reflecting post-Proposition 13 realities, expressly declared that Orange County's allotment was to come from existing resources or private donations. It prohibited the use of state funds for the court's library or equipment.<sup>6</sup>

In September 1981, Governor Brown signed the legislation, which was designed to go into effect on January 1, 1982. In October 1981, the Orange County supervisors voted to give the old courthouse to the state.

## The Dream Deferred.

Things, however, began to unravel almost immediately. In November 1981, the county discovered that the old courthouse was owned by the Civic Center Authority (not the county) and may have been used to secure a \$22.2 million bond.<sup>7</sup> In December 1981, former appellate justice Leonard Friedman filed a taxpayers' lawsuit in Sacramento to block the new judgeships. Plaintiffs denied charges by "[s]hallow cynics and ignorant analysts" that they were part of partisan attempts to forestall "'juicy' appellate appointments by the incumbent Governor."<sup>8</sup>

To the surprise of many, the lawsuit succeeded. On February 26, 1982, El Dorado Superior Court Judge Charles Fogerty held it was unconstitutional to make the Orange County appellate court dependent upon private donations. He stopped the new appellate court dead in its tracks with a permanent injunction.

Well, almost. Although no justices could be appointed, the clerk's office for the new division (temporarily located in the Orange County superior court) began to accept filings. The existing divisions in San Diego and San Bernardino transferred all pending Orange County cases to the nascent court.

The injunction galvanized the Legislature. On June 30, the Legislature appropriated \$209,480 in the 1982 Budget Act "to fund the library and equipment for Division Three of the Fourth Appellate District (the division holding sessions in Orange County)."<sup>9</sup>

In August the Supreme Court convened a special session to hear arguments in the case. Four of the court's seven justices recused themselves and were replaced by substitute appellate justices. On November 1 (election eve), the court, by a 4-3 vote, narrowly reversed the injunction, thereby authorizing the new "4-3." The majority determined that the Legislature could "authorize"

judgeships without deciding whether and how to procure the funding. Gerald Brown (no relation to the governor), sitting by assignment, provided the deciding vote. By coincidence, Brown was the administrative presiding justice of the Fourth District, and would supervise the new division.<sup>10</sup>

"Time is running out," the termed-out Governor said out to the court following the decision. "Through no fault of his own the Governor of this state is being denied the right to nominate candidates for judicial appointments."<sup>11</sup> On November 18, 1982, the court, also by a 4-3 vote, issued a special order to make the opinion immediately final.

Governor Brown promptly designated Justice John K. Trotter, Jr., 48, then sitting in Division Two, to be the new division's presiding justice. The governor elevated three Orange County superior court judges (Sheila Sonenshine, 37, Edward J. Wallin, 40, and Thomas F. Crosby, 42), to serve as associate justices. While all four were Democrats, Register staff writer Jeff Weir described them as "[a] home-grown foursome of young jurists, armed with solid credentials, raves from their peers and a flair for dispatching some controversial cases . . ."<sup>12</sup>

Tony Rackauckas, then a deputy district attorney on leave to head the Rose Bird recall campaign, said, "You won't find a brighter group. Trotter is clearly well qualified and a legal scholar. Crosby is talented and a liberal, but I suspect that with his strong loyalty to the law, he won't let his personal philosophy affect his decision." Vern Hunt, the vice-president of the conservative Lincoln Club, called Wallin "probably the best judge we have on the bench."<sup>13</sup>

On December 27, 1982, the new justices were confirmed by a 2-1 vote of the Commission on Judicial Appointments. Attorney General — and Governor elect — George Deukmejian was the sole dissenting vote, based in part on the nominees' refusal to give their personal opinions on such issues as the death penalty even though death penalty appeals go directly to the California Supreme Court.

## A Home of Its Own.

The new court began operations on January 3, 1983, the same day that Deukmejian assumed office. It had no signed lease, and faced ongoing negotiations for a half floor of temporary rental space in the nearby Sunwest Bank Building. The court began with a backlog of 240 appeals, 35 of which were fully briefed and ready for argument. "We're going to start work Monday, even if it's in

my kitchen," Trotter promised.<sup>14</sup>

Trotter proved true to his word. The January 4, 1983 issue of the Register contained a color picture of Wallin, Crosby and Trotter sitting around Trotter's dining room table "[w]ith sunlight splashing through the patio doors and coffee brewing on a nearby counter . . ."<sup>15</sup>

Early press coverage about the court was effusive. Deputy public defender (now justice) Richard Aronson was quoted in March 1983 as praising its accessibility. Rather than having to drive to San Bernardino to seek writ relief to continue a criminal trial, Aronson simply "walked it across the street." He obtained his requested relief an hour later, during jury selection.<sup>16</sup> Trotter predicted the new court would give rise to a "whole cadre of appellate lawyers in Orange County."<sup>17</sup>

Although the court scheduled oral arguments on 22 appeals within its first three months of operation, the backlog grew to 353 cases by March 1983. The court received 954 more cases by the end of the year, but still had one writ attorney, no central staff, and only two judicial attorneys per justice. Despite these handicaps, the justices authored 430 opinions in 1983 and disposed of an additional 480 appeals — about a dozen more written opinions per justice than the statewide average.<sup>18</sup>

But the court received 25 more cases a month than the justices were able to resolve. By May 1985, the court's backlog had grown to 772 cases, the worst in the state. Reflecting the county's extraordinary growth and increasing sophistication, 70 percent of these were civil cases, a markedly different ratio from elsewhere. Despite the court's efficiencies, Trotter predicted a 1,000 case backlog by year's end.<sup>19</sup>

With the new governor, the politics of court expansion shifted. Assembly member Frizzelle, formerly an opponent, introduced a bill to expand the court's numbers by 50 percent, from four justices to six. This time it was Democratic Assembly member Robinson who questioned the need, attributing the Frizzelle bill to "the fact that there is now a Republican in the governor's office."<sup>20</sup>

The court's projected growth did put the kibosh on any plans to use the Old County Courthouse as a permanent home. The county wanted to limit the court's access to the historic courtroom to five days a month to allow for other uses; the court, by contrast, wanted unlimited access upon 24 hours' notice. "Sooner or later we are going to get a fifth, sixth, seventh, maybe even an eighth justice," Trotter was quoted as saying in 1986.<sup>21</sup> In 1987, the Legislature passed an urgency

bill specifying the court's needs could not be adequately satisfied by space within the old building.<sup>22</sup>

Trotter was prescient about the court's ultimate size, but not about his own tenure. In August 1987, he left the bench to take a senior position at JAMS, the newly reorganized private judging firm. Sonenshine expressed her surprise, "I always thought we'd all serve out our 20 years on the court together. I never thought anybody would leave."<sup>23</sup>

Trotter's departure left the Deukmejian administration with its first appointment. Harmon Scoville went from being presiding judge of the superior court to presiding justice of the appellate court. Henry T. Moore, Jr. became the second Deukmejian appointee in August 1988 when the Legislature finally authorized a fifth appellate justice to the county's "highest and most overburdened court."<sup>24</sup>

In January 1989, the court finally acquired a permanent home in a green-gabled, early California style office building on Spurgeon Street, about a mile from the Santa Ana Civic Center. Much press notice was taken of Sonenshine's hot pink-and-black color scheme, which contained a warning for pregnant women "and those with faint hearts." Although declining to comment on his colleagues' decor ("to each her own"), Crosby predicted that the 26,600 square foot building would meet the court's needs for 20 years. Left unmentioned was whether the putting hole that Crosby placed in *his* chambers would survive the test of time.<sup>25</sup>

The court's current presiding justice, David G. Sills, joined the court in 1990 upon Scoville's retirement. By that time, the court was the second busiest division in the state. Though cognizant of the court's staggering workload, Sills pledged to retain the court's decision-making style: "Whether you agree or disagree with any particular opinion that comes from any justice's chambers, I don't ever recall hearing anybody criticize the quality. We have great people here who produce high quality work and [I] certainly want that to continue."<sup>26</sup>

In March 1995, Governor Pete Wilson named William Rylaarsdam to fill the vacancy created by the death of Henry Moore. With only five appellate justices, the court simply could not process the quantity of cases sitting in the pipeline. In June 30, 1996, the court reported a total of 217 appeals with records per justice, the highest number of any district or division in the state. William W. Bedsworth, added as a sixth justice in 1997, helped to stem the flow, but still "[t]he appeals

arrived faster than they could be processed — kind of like Lucille Ball and the conveyor belt chocolates."<sup>27</sup>

The November 1998 elections saw four of the court's six justices (Sills, Wallin, Rylaarsdam and Bedsworth) on the ballot throughout the entire Fourth District. Although some 800,000 voters chose to retain him, Bedsworth couldn't fathom how "300,000 people in the counties of Orange, San Diego, Riverside, San Bernardino, Imperial, and Inyo decided that given the choice between me and nobody, they'd take nobody. . . . It's hard not to lose a hat size or two when that many people indicate they'd rather retain water than you."<sup>28</sup>

Shortly thereafter, a statewide task force proposed that the Ventura, Riverside and Santa Ana appellate courts be converted into stand-alone districts. Orange County would become the Ninth Appellate District.<sup>29</sup> Given the predictable confusion between the federal "Ninth Circuit" and the state "Ninth District," the proposal would have been a public information nightmare for Orange County. It never gained traction.

The court's numbers dropped back to four in 1999 as two of the court's founding justices retired. It took Governor Gray Davis a year to replace Sonenshine with Kathleen O'Leary, and almost two years to replace Wallin with Eileen Moore. Not surprisingly, the court's backlog rocketed back to 1,000 fully briefed cases awaiting decision.

In June 2001, Crosby was the last of the founders to call it quits, just short of his 20th anniversary. With three additional Davis appointments (Richard M. Aronson, Richard D. Fybel and Raymond J. Ikola), the court has finally reached its eight-justice complement, as forecast by Trotter in 1986. The backlog has vanished through a fortuitous combination of full staffing and hard work.

Even the court's "permanent" home on Spurgeon Street itself is due to be retired on its own 20th anniversary in 2008, just as Crosby had predicted. The justices and their staff no longer can fit under one roof. The state has commenced the process of constructing a new 55,000 square foot court building immediately east of the Santa Ana City Hall, where the court held its first oral argument in early 1983.

A narrative of Orange County's appellate court shows the power of geography. Geography is the question to which the court is the answer. With a court to call its own, the county's legal landscape has acquired a physical dimension and a sense of place.

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<sup>1</sup> See *Kitzmiller v. Dover Area School Dist.*, 400 F.Supp.2d 707 (M.D. Pa. 2005).

<sup>2</sup> Robert S. Thompson, *Judicial Retention Elections and Judicial Method: a Retrospective on the California Retention Election of 1986*, 61 S.Cal.L.Rev. 2007, 2010, fn. 3 (Sept. 1988).

<sup>3</sup> California Judicial Council, Report of the Appellate Process Task Force 31 (Aug. 2000) (Strankman Committee).

<sup>4</sup> Alan Ashby, *Analyst Suggests No New Appellate Justices and Clerks*, L.A. DAILY J. (Feb. 20, 1981).

<sup>5</sup> Alan Ashby, *Judiciary Panel OKs Bill Calling for New Appeal Courts*, L.A. DAILY J. (Mar. 1981).

<sup>6</sup> Stats. 1981, ch. 959.

<sup>7</sup> Jeffrey Perlman, *Old Courthouse Could Take on New Life*, L.A. TIMES (Nov. 1, 1981).

<sup>8</sup> Opp. to Pet. for Writ of Mandate, filed Mar. 8, 1982, SF 24403, p. 5.

<sup>9</sup> Stats. 1982, ch. 326.

<sup>10</sup> *Brown v. Superior Court*, 33 Cal.3d 242 (1982).

<sup>11</sup> Opposition of Petitioner, Edmund G. Brown, filed Nov. 16, 1982, S.F. 24403, p. 1.

<sup>12</sup> Jeff Weir, *A Look at County's First-Ever Appeals Court*, O.C. REGISTER (Dec. 2, 1982).

<sup>13</sup> *Ibid.*

<sup>14</sup> Jerry Hicks, *Four Confirmed as Justices for County's New Appellate Court*, L.A. TIMES (Dec. 28, 1982).

<sup>15</sup> Tim Alger, *New Appellate Court Off to a Nomadic Start*, O.C. REGISTER (Jan. 4, 1983).

<sup>16</sup> Jerry Hicks, *New Court Has a Lot of Appeal*, L.A. TIMES (Mar. 21, 1983).

<sup>17</sup> *Ibid.*

<sup>18</sup> Jerry Hicks, *Santa Ana Division Has Largest Backlog of Appellate Courts*, L.A. TIMES (Aug. 3, 1985); John Spano, *Judge Says Appeals Court at 'Saturation Point' With Backlog*, L.A. TIMES (Aug. 29, 1986).

<sup>19</sup> James S. Granelli, *Justice Trotter Urges Expansion of Santa Ana Court*, L.A. TIMES (Jan. 11, 1985).

<sup>20</sup> Kenneth F. Bunting, *Robinson Now Cool to Appeals Court Growth*, L.A. TIMES (Mar. 21, 1985).

<sup>21</sup> Kristina Lindgren, *Assemblyman Forges Compromise on County Courthouse*, L.A. TIMES (Oct. 11, 1985).

<sup>22</sup> John Spano, *Jury Is In and Judges Are Out*, L.A. TIMES (Jun. 15, 1987).

<sup>23</sup> James S. Granelli, *Justice Trotter to Quit Appeal Court*, L.A. TIMES (Jun. 8, 1987).

<sup>24</sup> Gregg Zoroya, *OC Judge is Nominated for New Appellate Slot*, O.C. REGISTER (Jul. 23, 1988).

<sup>25</sup> Donna Prokop, *Appeal Court to Move to New Location*, L.A. DAILY JOURNAL (Jul. 26, 1988); Linda C. Puig, *4th District Appeals Court Set to Move*, O.C. REGISTER (Jan. 15, 1989).

<sup>26</sup> Robert C. Robinson, *Meet the New Presiding Justice of Division Three*, 32 ORANGE COUNTY LAW. 12 (Oct. 1990).

<sup>27</sup> Franz E. Miller, *Is Eight Enough? A Look at Numbers and Personalities at the Santa Ana Court of Appeal*, 43 ORANGE COUNTY LAW. 10 (Oct. 2001).

<sup>28</sup> William Bedsworth, *A Criminal Waste of Space, Tippecanoe & Wallin Too*, 40 ORANGE COUNTY LAW. 40 (Dec. 1998). Bedsworth had no logical explanation for his colleagues' vote totals either: "Dave Sills got 70,000 more votes than another justice. Now I have no doubt that Dave is better at this than the rest of us. But I can't imagine how 70,000 voters found that out. Bill Rylaarsdam got fewer votes than I did. This will astonish anyone who has ever spent five minutes discussing the law with Bill Rylaarsdam and five minutes discussing it with me. The obvious conclusion is that if you're going to run for office and have a double-a in your name, it better be Hank Aaron." *Id.* at 42.